

(16,844.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 276.

JOHN H. SCUDDER, ADMINISTRATOR OF THE ESTATE  
OF JOHN F. HOUDAYER, DECEASED, PLAINTIFF IN  
ERROR,

*vs.*

THE COMPTROLLER OF THE CITY AND COUNTY OF  
NEW YORK.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW  
YORK, STATE OF NEW YORK.

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1 The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye that we, having examined the records and files in the office of the surrogate of the county of New York, do find there remaining a certain record, and have compared the said notice of appeal, bond, papers, and order in the matter of the appraisal of the property of John F. Houdayer, deceased, under the act in relation to taxable transfers of property, with the originals thereof in this office, and have found the same are true and correct copies of such originals, and the same with the originals thereof are all the papers upon which said order was made and are in the words and figures following, to wit:

2 STATE OF NEW YORK, ss:

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the sixth day of October, in the year of our Lord one thousand eight hundred and ninety-six, before the judges of said court.

Witness the Hon. Charles Andrews, chief judge, presiding.  
GORHAM PARKS, *Clerk*.

Remittitur, October 7th, 1896.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

Be it remembered that on the thirteenth day of April, in the year of our Lord one thousand eight hundred and ninety-six, Ashbel P. Fitch, comptroller of the city and county of New York, the appellant in this action, came here into the court of appeals, by Emmett R. Olcott, his attorney, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court of the first judicial department, and John H. Scudder, as administrator, &c., the respondent in said proceeding, afterwards appeared in said court of appeals by J. Culbert Palmer, his attorney.

Which said notice of appeal and the return filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. Emmett R. Olcott, of counsel for the appellant, and by Mr. J. Culbert Palmer, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court for the first judicial department, appealed from herein to this

court, be, and the same is hereby, reversed, and that the order of the surrogate be affirmed with costs; and it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the surrogate's court in the county of New York, there to be proceeded upon according to law.

Therefore it is considered that the said order be reversed and the order of the surrogate be affirmed with costs as aforesaid.

And thereupon as well as the notice of appeal and return thereto aforesaid by them given in the premises are by the said court of appeals remitted unto the surrogate's court in the county of New York, before the surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said surrogate's court before the surrogates thereof, &c.

GORHAM PARKS,

*Clerk of the Court of Appeals of the State of New York.*

Court of Appeals, Clerk's Office.

ALBANY, *October 7th, 1896.*

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.]

GORHAM PARKS, *Clerk.*

4

In the Court of Appeals.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

Papers on appeal of comptroller of the city of New York from order of the supreme court, appellate division, first department, reversing order of surrogate of New York county fixing transfer tax on property of deceased.

Emmet R. Olcott, attorney for comptroller, appellant.

J. Culbert Palmer, attorney for administrator, respondent.

5

*Statement.*

In the Court of Appeals.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

This proceeding was begun on the 27th day of September, 1895, by the filing of a petition for the appointment of an appraiser, and an order making such appointment.

The names of the original parties to this proceeding are as follows: Ashbel P. Fitch, as comptroller of the city of New York.

John H. Scudder, as administrator of the goods, chattels and credits of John F. Houdayer, deceased.

Louise Houdayer, his widow.

Josephine Valliè, his niece, and

Angele Dubois, his niece.

There has been no change in the parties, all of whom appeared and are before the court.

The appeal is from an order of the appellate division, first department, reversing the order of the surrogate of the county of New York fixing a tax on the property of the decedent alleged to be within this State, under the act in relation to taxable transfers of property.

6 New York Supreme Court.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

SIRS: Please take notice that the comptroller of the city of New York hereby appeals to the court of appeals from the order made herein on the 10th day of April, 1896, reversing the order of the surrogate of the county of New York, made herein on the 21st day of January, 1896.

Dated New York, April 10, 1896.

Yours, &c.,

EMMET R. OLCOTT,  
*Attorney for the Appellant, 35 Broadway, N. Y.*

To Henry D. Purroy, Esq., clerk, &c.; J. Culbert Palmer, Esq., attorney for administrator, respondent.

7 Surrogate's Court, New York County.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

To the surrogate's court of the county of New York:

The petition of Ashbel P. Fitch respectfully shows:

I. That he is the comptroller of the city and county of New York.

Upon information and belief.

II. That on the 21st day of May, in the year 1895, the said decedent, then residing in the city of Trenton and State of New Jersey, was seized and possessed of property within the State of New York, subject to its laws, of the value of upwards of seventy thousand dollars, and that on the said 21st day of May, 1895, the said decedent departed this life intestate.

III. That such proceedings were had before the court of probate at the city of Trenton, New Jersey, that Louise Houdayer and John H. Scudder, both residents of such city of Trenton, were duly ap-

8 pointed administrators of the goods, chattels and credits of the said decedent; that they duly qualified and are now acting as such.

IV. That no application has been made to any court in this State for letters of administration upon the estate of said decedent, nor has any last will been presented for probate.

V. That the said decedent died possessed of certain moneys on deposit in the city and county of New York, which are taxable under the transfer tax act of the State of New York.

VI. That the said administrators have endeavored to remove the estate of the said decedent within this State therefrom, without any appraisal for the payment of the tax fixed by law under the said transfer tax act, and without any application to the surrogate of this county for the appointment of an appraiser to appraise the property of the said decedent under the said transfer tax act.

VII. That under the provisions of the statute in regard to intestates of the State of New Jersey, where the said decedent was domiciled at the time of his death, the following persons are entitled to his property, that is to say:

Louise Houdayer, his widow.

Josephine Valliè, a niece.

Angele Dubois, a niece.

VIII. That such property of the said decedent, or some part thereof, is subject to the act in relation to taxable transfers of property.

IX. That all the persons who are interested in the said estate, and who are entitled to notice of all proceedings, including the comptroller of the city and county of New York, and their post-office addresses, are as follows:

Ashbel P. Fitch, comptroller, &c., 280 Broadway, New York, N. Y.

Louise Houdayer, Trenton, N. J.

9 John H. Scudder, *idem*.

Josephine Valliè, care of John H. Scudder, Trenton, N. J.

Angele Dubois, 375 Bank street, New York, N. Y.

Wherefore, your petitioner prays that you will appoint some competent person as appraiser as provided by law.

And your petitioner will ever pray, &c.,

ASHBEL P. FITCH, *Petitioner*.

(Verification.)

At a surrogate's court held in and for the county of New York, at the county court-house, in the city of New York, on the 27th September, 1895.

Present: Hon. John H. V. Arnold, surrogate.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

On reading and filing the petition of Ashbel P. Fitch, comptroller of the city and county of New York, praying for the appointment of some competent person as appraiser under and in pursuance of

the act in relation to taxable transfers of property, now, on, motion of Emmet R. Olcott, Esq., attorney and of counsel for the said petitioner, it is

Ordered that Gilbert W. Minor, Esq., be and he is, hereby appointed such appraiser; and it is further

10 Ordered that the said appraiser give the notice required by law (which notice shall be ten days), in the manner and at the time therein set forth, to the following persons and to all other persons known to have or claim an interest in the property of the decedent named in the above-entitled proceeding, that is to say:

Ashbel P. Fitch, comptroller, &c., 280 Broadway, New York, N. Y.

John H. Scudder, Trenton, N. J.

Louise Houdayer, Trenton, N. J.

John H. Scudder, *idem*.

Josephine Valliè, care of John H. Scudder, Trenton, N. J.

Angele Du Bois, 375 Bank street, New York, N. Y.

JOHN H. V. ARNOLD, *Surrogate*.

### Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the act in Relation to Taxable Transfers of Property, of the Property of JOHN F. HOUDAYER, Deceased.

You will please to take notice that, by virtue of an order of Hon John H. V. Arnold, one of the surrogates of the county of New York, made and dated the 27th day of September, 1895, and pursuant to provisions of chapter 399 of the Laws of 1892, entitled, "An act in relation to taxable transfers of property," I shall on the 16th day

11 of Oct. 1895, at 11 o'clock in the forenoon of that day, at room No. 12, Stewart building, No. 280 Broadway, in the city of New York, proceed to appraise at its fair market value all the property of said decedent, deceased, late of said city, passing by his last will and testament, or by the intestate laws of the State of New York, which is subject to the payment of the tax imposed by the said act.

And such of you as are hereby notified as are under the age of twenty-one years are required to appear by your guardian, if you have one, or if you have none, to appear and apply for one to be appointed, or in the event of your neglect or failure to do so, a guardian will be appointed by the surrogate to represent and act for you in the proceeding.

New York, Oct. 5, 1895.

GILBERT W. MINOR,

*Appraiser, Room 87, No. 206 Broadway, N. Y. City.*

To John H. Scudder.



## Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of JOHN F. HOUDAYER, Deceased.

You will please take notice that John H. Scudder, administrator of the goods and chattels which were of John F. Houdayer, deceased, hereby appears in this action, and that I have been retained as attorney for him therein.

Dated New York, N. Y., October 11, 1895.

J. CULBERT PALMER,

*Attorney for John H. Scudder, Administrator, &c.,*

165 Broadway, New York, N. Y.

To Gilbert W. Minor, appraiser, 206 Broadway, New York city.

Service of a copy of the above notice of appearance this day admitted.

Oct. 11, 1895.

GILBERT W. MINOR, *Appraiser.*

## Surrogate's Court, New York County.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of JOHN F. HOUDAYER, Deceased.

STATE OF NEW JERSEY, } ss:  
County of Mercer,

John H. Scudder, being duly sworn, deposes and says that he resides in the city of Trenton, State of New Jersey; that on the 21st day of May, 1895, John F. Houdayer, a citizen of the State of New Jersey, died in the city of Trenton, which was the place of his residence; that said John F. Houdayer left no last will and testament, and that on the sixth day of June, 1895, deponent and one Louise Houdayer (decedent's widow) duly qualified as administrators of decedent's estate before the court of probate of the city of Trenton, State of New Jersey, and that no administration has been applied for in the State of New York.

Deponent further says that said John F. Houdayer left him surviving his widow, Louise Houdayer, residing in the city of Trenton, State of New Jersey; Josephine Vallèi, a niece residing at La Maus Sarthe, France; and Angele Du Bois, a niece residing at No. 37 Bank street, New York city, his only heirs and next of kin.

Deponent further says that some time previous to decedent's death, decedent had been appointed by the terms of the last will and testament of Edmund Husson, deceased, trustee of certain trusts, created by said last will and testament; that on or about the first day of January, 1876, decedent opened an account in the Farmers' Loan and Trust Company of the City of New York, as trustee under the will of Edmund Husson, deceased, in which he, from time to time,



made deposits of funds belonging to said trust estate, and in which, as appears by the private books of decedent, he also, from time to time, made deposits of money belonging to himself individually; that said deposits were subject to sight draft; were frequently drawn on by cheque by decedent and were maintained constantly as an open running account from the date of the first deposit to the time of decedent's death; that at the time of decedent's death, the total amount of said deposit was seventy-three thousand and seven hundred and fifteen dollars (\$73,715), of which there appeared by his said books of account, to have been deposited by said John F. Houdayer, individually, the sum of seventy-one thousand and seven hundred and fifteen dollars (\$71,715.)

Deponent further says that some time after the death of said  
14 decedent, and on the petition of the beneficiaries of the unexecuted trust created under and by virtue of the will of Edmund Husson, deceased, deponent was appointed by the supreme court of the State of New York, substituted trustee in the place of John F. Houdayer, deceased, to execute said unexecuted trust. Deponent thereby united in himself the offices of substituted trustee under the will of Edmund Husson, deceased, and of co-administrator of the estate of John F. Houdayer, deceased. Deponent further says that by reason of the double capacity in which he acted, as appears above, and of his intimate acquaintanceship with the business affairs of John F. Houdayer, deceased, and in consequence of the harmonious relations existing between the various *cestuis que trust* of the trust created by the last will and testament of Edmund Husson, deceased, the widow and next of kin of John F. Houdayer, deceased, no accounting was deemed necessary to be made to determine the proportions of the deposit in the Farmers' Loan & Trust Company, which should be credited to the trust estate and to the individual estate of the said John F. Houdayer, deceased, but that said deponent by and with the consent of all the parties interested, has charged to and paid from the estate of John F. Houdayer, the sum of two thousand dollars (\$2,000), as the portion of said deposit due and owing by said estate to the trust estate created under the will of Edmund Husson, deceased, and as such co-administrator of said John F. Houdayer, deceased, has collected from said trust company the balance of deposit, to wit: the sum of seventy-one thousand seven hundred and fifteen dollars (\$71,715), with the exception of about four thousand dollars (\$4,000), left with said trust company, awaiting the decision of the courts in the matter of the levying of the tax under the transfer tax law.

Deponent further says that there was no other property or claim in this State to which decedent has any title. Deponent further says that decedent left an estate in the States of New Jersey, Kansas  
and Missouri, which, with the deposit in the city of New  
15 York aforesaid, aggregated the sum of two hundred thousand dollars (\$200,000.)

Deponent further says that the debts left by said John F. Houdayer, deceased, together with the expenses of administering his estate, will amount to about the sum of ten thousand dollars, ex-

clusive of the amount of the deposit hereinbefore referred to, which has been credited to the substituted trustee under the last will and testament of Edmund Husson, deceased, as aforesaid.

Deponent further says that he understands and believes that proceedings have been instituted by the authorities of the State of New York, to appraise for the purpose of levying a tax thereon, under the act in relation to taxable transfers of property in the State of New York, the property of decedent within the State of New York, in which he believes it is intended to include the amount on deposit in the Farmers' Loan & Trust Company, as aforesaid.

Deponent further says that he objects to such proceedings and opposes a levy of any such tax upon such amount so on deposit, and claims that said deposit is exempt under the laws, and not subject to taxation.

JOHN H. SCUDDER.

Sworn to before me this 24th day of October, 1895.

Witness my hand and seal.

JAMES S. AILKEN,  
*Notary Public.*

(County clerk's certificate attached.)

16 Surrogate's Court, New York County.

In the Matter of the Appraisal, under the act Relating to Taxable Transfers of Property, of the Property of JOHN F. HOUDAYER, Deceased.

STATE OF NEW YORK, }  
City and County of New York, } ss:

John H. Scudder, being duly sworn, deposes and says that it is the intention of the administrators of the estate of John F. Houdayer, deceased, to pay all claims against said estate, together with the expenses of administering the same, from the fund created by collecting from the Farmers' Loan & Trust Company of the City of New York, the deposit therein standing in the name of the said John F. Houdayer, as trustee at the time of his decease, or from such portion of the same as they are entitled to claim as administrators of the said John F. Houdayer deceased.

Deponent further says that this affidavit is made as a part of and supplementary to the original affidavit made by him in the above matter.

JOHN H. SCUDDER.

Sworn to before me this 21st day of November, 1895.

HENRY A. RUBINO,  
*Notary Public, N. Y. Co., No. 85.*

## 17 Surrogate's Court, New York County.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property. Died May 21st, 1895.

To the surrogate's court, county of New York :

I, the undersigned, who was, by an order made and entered on the 27th day of September, 1895, appointed appraiser under and in pursuance of the law in relation to taxable transfers of property, a certified copy of which order is hereto attached, respectfully report :

First. That forthwith, after my said appointment, I duly took and subscribed the oath prescribed by statute, which said oath is hereto annexed.

Second. That thereafter, on the 5th day of October, 1895, I duly gave notice by mail, postage prepaid, to all persons known to have or claim an interest in all property of said John F. Houdayer, deceased, subject to the payment of the tax imposed by said law, including those named by the surrogate in the said order, of the time and place I would appraise the property of John F. Houdayer, deceased, subject to the payment of the said tax; a true copy of said notice, together with proof of mailing thereof, is also hereto attached.

Third. I further report that the following appearances were made before me in this proceeding: Emmet R. Olcott, Esq., for the comptroller; J. Culbert Palmer, Esq., for the administrator.

18 Fourth. I further report that the decedent died on the 21st of May, 1895.

Fifth. I further report that at the time and place in said notice stated, to wit, on the 16th day of October, 1895, at No. 280 Broadway, in the city of New York, and at other and subsequent times and at divers places, I appraised all the property, being personal property of the said John F. Houdayer, deceased, subject to the payment of said tax, at its fair market value, as follows, to wit:

*Personal Estate within the State of New York.*

On deposit in the Farmers' Loan & Trust Company of

N. Y. .... \$71,715 00

From which I deduct :

7/20, *pro rata* share of debts, including the expenses of administering the estate. .... 3,500 00

Net personal estate in N. Y. .... \$68,215 00

Which sum, under the interstate laws, is divided as follows:

To Louise Houdayer, wife,  $\frac{1}{2}$  of net estate... \$34,107 50

" Josephine Valliè, niece,  $\frac{1}{4}$  of net estate... 17,053 75

" Angele Du Bois, niece,  $\frac{1}{4}$  of net estate... 17,053 75

Dated New York, January 17th, 1896.

Respectfully submitted.

GILBERT W. MINOR, Appraiser.

19 At a surrogate's court held in and for the county of New York, at the county court-house in the city of New York, on the 17th day of January, 1896.

Present: Hon. Frank T. Fitzgerald, surrogate.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property. Died May 21st, 1895.

On reading and filing the report of the appraiser, Gilbert W. Minor, heretofore appointed herein, now, on motion of Emmet R. Olcott, Esq., attorney and of counsel for the comptroller, it is

Ordered, that the respective interests of the beneficiaries in the estate of the said decedent within the State of New York, and the tax to which the same is liable under the act in relation to taxable transfers of property, are hereby determined, fixed and assessed as follows:

Beneficiaries.	Interest.	Tax.
Louise Houdayer .....	\$34,107 50	\$341 07
Josephine Valliè.....	17,053 75	852 69
Angele Du Bois.....	17,053 75	852 68

FRANK T. FITZGERALD, *Surrogate.*

SIR: Please take notice that the within is a copy of the order fixing transfer tax in the within-entitled proceeding, entered  
20 in the office of the clerk of the surrogate's court for the county of New York, on the 17th day of January, 1896.

Yours, etc.,

EMMET R. OLCOTT,

*Att'y and of Counsel for the Comptroller.*

To J. Culbert Palmer, Esq., attorney for administrator, 167 Broadway, N. Y.

Surrogate's Court, New York County.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

Please take notice that John H. Scudder, administrator, &c., of the said decedent, hereby appeals to the surrogate of the county of New York from the order fixing a transfer tax herein and entered in the office of the said surrogate on the 17th day of January, 1896, on the ground that the deposit in the Farmers' Loan and Trust Company of \$71,715, standing at the time of decedent's death in his name as trustee, was a chose in action belonging to a non-resident decedent, and not property within this State subject to taxation under the provisions of the act in relation to taxable transfers of property; that the situs of the claim of decedent against such deposit was at the domicile of the decedent and not at the domicile of the said depository, and such property being the property of

21 a non-resident decedent, and situated out of this State, the same does not fall within the purview of said act. Even if

regarded as property within this State, it is not taxable thereunder, because such property was only transiently within this State.

In any event the expenses of administering the estate should be deducted entirely from the amount of deposit.

Dated New York, January 18th, 1896.

Yours, &c., J. CULBERT PALMER,  
*Attorney for Administrator, 165 Broadway, New York, N. Y.*

To J. Fairfax McLaughlin, Esq., clerk of the surrogate's court;  
Emmet R. Olcott, Esq., att'y and of counsel for the comptroller, 35  
Broadway, N. Y. city.

At a surrogate's court, held in and for the county of New York,  
at the county court-house in the city of New York, on the 21st day  
of January, 1896.

Present: Hon. Frank T. Fitzgerald, surrogate.

In the Matter of the Appraisal of the Property of JOHN F. HOU-  
DAYER, Deceased, under the Act in relation to Taxable Transfers  
of Property.

22 An appraiser having heretofore been duly appointed herein to as-  
sess and fix the cash value of the estate of the said decedent  
subject to the provisions of the act in relation to taxable  
transfers of property, and the report of such appraiser hav-  
ing been duly made and filed, and an order having thereupon been  
duly entered and filed on the 17th day of January, 1896, fixing and  
determining the respective interests of the beneficiaries in the estate  
of said decedent, and the tax to which the same is liable, and John  
H. Scudder, administrator, &c., of said decedent having appealed  
to the surrogate from said order of January 17th, 1896, now on mo-  
tion of Emmet R. Olcott, Esq., attorney and of counsel for the  
comptroller, and after hearing J. Culbert Palmer, Esq., attorney and  
of counsel for said John H. Scudder, administrator, &c., of said de-  
cedent.

It is ordered that the said order of the surrogate heretofore made  
herein on the 17th day of January, 1896, be and the same is hereby  
affirmed.

FRANK T. FITZGERALD, *Surrogate.*

No objection is made to the form of the foregoing order.

EMMET R. OLCOTT,  
*Att'y for Comptroller.*  
J. CULBERT PALMER,  
*Att'y for Admin.*

Please take notice that the within is a true copy of an order af-  
firming order this day duly entered in the office of the clerk of this  
court, in the city of New York.

Dated New York, January 21st, 1896.

EMMET R. OLCOTT,  
*Attorney and of Counsel for the Comptroller,*  
35 Broadway, New York, N. Y.

To J. Culbert Palmer, Esq., attorney for administrator, etc.

23 Surrogate's Court, New York County.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under an Act in Relation to Taxable Transfers of Property.

SIRS: Please take notice, that John H. Scudder, administrator, &c., of the said decedent hereby appeals to the appellate division of the supreme court from the order entered herein on the twenty-first day of January, 1896, which affirmed the order made on the seven-teenth day of January, 1896, fixing the transfer tax due on the interests of the parties entitled to the estate of said decedent.

Dated New York city, January 22, 1896.

Yours, &c., J. CULBERT PALMER,  
Att'y for John H. Scudder, as Administrator, &c.,  
165 Broadway, New York, N. Y.

To J. Fairfax McLaughlin, Esq., clerk of the surrogate's court;  
Enmet R. Olcott, Esq., attorney and of counsel for the comptroller,  
35 Broadway, New York, N. Y.

24 Supreme Court, Appellate Division, First Department.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

CITY AND COUNTY OF NEW YORK, ss :

J. Culbert Palmer, being duly sworn, says that he is the attorney for John H. Scudder, administrator, &c., and appellant in this proceeding.

That, as he is informed and believes, the report of the appraiser herein and the order confirming said report, and the order confirming the said order were made by his honor, Frank T. Fitzgerald, without handing down any written opinion, and that the appraiser herein rendered no other opinion than the said report.

J. CULBERT PALMER.

Sworn to before me this 25th day of January, 1896.

HENRY A. RUBINO,  
Notary Public No. 85, New York Co.

25 Supreme Court, Appellate Division, First Department.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property. Appeal of the Administrator, &c.

It is hereby stipulated that the foregoing are correct copies of the notice of appeal herein to the appellate division, the order appealed from and of all the papers on which the court below acted in mak-



ing such order, on file in the office of the clerk of the surrogate of the county of New York.

Dated New York, January 25, 1896.

J. CULBERT PALMER,

*Att'y for Administrator.*

EMMET R. OLCOTT,

*Att'y and of Counsel for the Comptroller.*

26 At a term of the appellate division of the supreme court, held in and for the first department at the court-rooms, in the city of New York, on the 10th day of April, 1896.

Present: Hon. Charles H. Van Brunt, P. J.; Hon. George C. Barrett, Hon. William Rumsey, Hon. Morgan J. O'Brien, Hon. George L. Ingraham, JJ.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

The appeal of John H. Scudder, administrator of the goods, chattels and credits of John F. Houdayer, deceased, from the order of the surrogate of the county of New York, dated the 21st day of January, 1896, affirming the order herein dated the 17th day of January, 1896, coming on to be heard, and after hearing J. Culbert Palmer, Esq., of counsel for the appellant, and Emmet R. Olcott, Esq., of counsel for the respondent, and due deliberation having been had thereon; now, on motion of J. Culbert Palmer, Esq., attorney for the appellant,

It is ordered, that the said order of the surrogate of the county of New York, dated January 21, 1896, be and the same is hereby reversed, with costs to said appellant.

Enter.

C. H. V. B.

27 Supreme Court, Appellate Division, First Department.

Present: Hons. Charles H. Van Brunt, P. J.; George C. Barrett, William Rumsey, Morgan J. O'Brien and George L. Ingraham, JJ.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

Appeal by John H. Scudder, administrator of the estate of John F. Houdayer, deceased, from order of the surrogate's court of New York, entered the 21st day of January, 1896, affirming an order of said court, entered the 17th day of January, 1896, fixing the transfer tax due upon the interests of the beneficiaries in the estate of the said decedent.

J. Culbert Palmer for the appellant.

Emmet R. Olcott for the comptroller, respondent.

BARRETT, J.:

The question here is, whether the balance due the decedent at the time of his death—resulting from deposits made by him individu-



ally in a trust account which, as trustee under the will of Edmund Husson, deceased, he had opened in the Farmers' Loan and Trust Company of this city—was "property" of the decedent "within this State" within the meaning of the taxable transfers act (Laws of 1892, chapter 399, sec. 1, subd. 2). It is well settled that the legal relation which existed between the decedent, as such trustee, and the Farmers' Loan and Trust Company was that of debtor and creditor. The deposits became the property of the trust company, and thereupon the company became indebted to the depositor for the amount so deposited. Here, however, even this relation existed only between the decedent in his representative capacity (as trustee under the will of of Edward Husson) and the company. Individually he occupied no contract relation toward the company. His individual deposits simply went to swell the trust account. Ordinarily it would have required an accounting in equity to separate the individual from the trust deposits, and to appropriate the general bank balance in accordance with just principles. Here that separation was amicably arranged between the decedent's estate and the trust estate, but this was merely a friendly substitute for an accounting. Precisely what the decedent had individually within this State was the right to an accounting in equity with regard to a debt due by the company to himself as Husson's trustee. We do not think that the debt was property within this State within the meaning of the taxable transfers act. Much less was the right to an accounting with respect to such debt. It is provided by section 22 of the act in question, that the word property as used therein shall "include all property or interest therein, whether situated within or without the State, over which this State has any jurisdiction for the purpose of taxation." No more and no less. Not property generally, it will be observed. Not even property as defined by the statutory construction act passed later in the session of 1892; for much of what is within its definitions is property over which

28 the State cannot as against non-residents have any jurisdiction. Thus the act is in harmony with the authorities which hold that the power of taxation of a State is limited to persons, property and business within her jurisdiction (Foreign Bond case, 15 Wall., 300). This jurisdiction, however, is not what the State may choose to assert, but what, as matter of fact, it possesses. Here, for instance, this State has no jurisdiction over the person of the decedent. He was, in fact, a non-resident of this State. It does not appear that he transacted business within this State, so the jurisdiction upon that head was also lacking. The question remains as to his property. It was distinctly held in the Foreign Bond case (*supra*) that debts have no *situs* independent of the domicile of the creditor; and that such debts are the property of the creditor, and follow his domicile. It is of no moment in the application of this rule where the debtor resides or does business, or where he may be found. A debt can have no locality separate from the party to whom it is due. The debt there was evidenced by the bonds of a domestic corporation, but as such bonds were not within the taxing State, as in fact they were in the actual possession of the owner at his foreign domicile,

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the Supreme Court of the United States held that the property evidenced thereby was not within the taxing State and was not taxable there.

Thus clearly this State has no jurisdiction, for the purposes of taxation, over the right in action here possessed by the decedent. It asserted no such jurisdiction in the act in question, nor could it have done so. Its jurisdiction, so far as non-resident decedents were concerned, was limited to property which had a visible and tangible existence. As to visible and tangible property, the fiction of a legal *situs* at the domicile of the owner gives way to the fact of the actual *situs*. With regard to choses in action, however, and intangible property generally, the legal *situs* is, to all intents and purposes, the actual *situs* (*Hoyt v. Commissioners*, 23 N. Y., 30 224). The debtor is not the debt, and jurisdiction over the debtor is not, for the purposes of taxation, jurisdiction over his obligation. There is jurisdiction to attach, but not to tax, the debt. The right to attach proceeds upon the jurisdiction over the resident debtor. There is jurisdiction to compel such debtor to pay what he owes his creditor to the latter's creditor. In that case the attachment does not create the obligation. It enforces it. The tax, however, creates the liability, and also enforces it. That can only be done when the person or the property of the creditor is within the jurisdiction. The State cannot create a liability in its own favor against the non-resident creditor by the mere exercise of jurisdiction over the resident debtor. It can enforce an existing liability, but it cannot create one.

This rule is in entire harmony with that laid down in the *Whiting* case, lately decided by this appellate division (*N. Y. Law Journal*, March 30, 1896). The tax was there imposed upon corporate bonds which were not, as in the railroad bond case, in the actual possession of the decedent at his foreign domicile, but were in fact on deposit in a safe deposit company in this city. These bonds were essentially property. They were not, like shares of stock, mere evidences of an interest in the corporation. They were salable and repleviable as ordinary chattels. They required no written transfer to pass the title thereto.

The fiction of the legal *situs* might well give way with respect to coupon bonds, thus passing from hand to hand by delivery, the same as chattels generally. If such bonds are brought here for permanent safe keeping, they are not only within the jurisdiction of the State in a technical sense, but are within the principle upon which all taxation rests, namely, the protection of our laws, and the protection of the system inaugurated by those laws and guarded by its ministers. So far as the securities in that case were bonds 31 of the United States, another question arose, namely, whether as to a non-resident decedent the tax was to be treated strictly as a tax upon the right of succession. Of course, if it was in any just sense a tax upon property, the bonds of the United States were specially exempt. As to residents, the tax has been repeatedly held to be a tax upon the right of succession under a will, or by devolution, in cases of intestacy (*Matter of Swift*, 137 N. Y., 88; *Matter of*

Merriam, 141 N. Y., 484). This precise rule has never yet been extended in terms to non-resident decedents, and that question is an open one, unless, indeed, the general rule which the court of appeals laid down in the Swift and Merriam cases was intended to cover non-resident as well as resident decedents. There would certainly seem to be a distinction between the two classes. In the case of residents, the right of succession or devolution is given by the State which imposes the tax. That State may limit the right as it pleases. Consequently it was held in the Merriam case that, assuming that the legacy there in question vested "at the moment of the testator's death, yet in contemplation of law the tax was fixed on the succession at the same moment of time." Can this be said where the estate or legacy vests under the laws of a foreign State? Does not the person in whom the estate vests, and who comes to this State to secure possession of property of the decedent situated here, so come possessed of the legal title to such property? The right of succession is not conferred upon him by the laws of this State, but by the laws of the State where the decedent resided and died. It would seem, therefore, that as against such a person, the tax, however it may be obscured or styled, is essentially a tax upon property within our jurisdiction, and not upon the right of succession thereto. If it is upon the right of succession, then plainly it is a tax upon a right granted by a foreign State. If it is not a tax upon such right, then it is simply a tax upon property acquired through the instrumentality of a foreign succession law. And that in substance is what it is. In common parlance, it is a succession tax. But in legal parlance it is, as was intimated in the matter of James (144 N. Y., 10), "a tax upon property in this State passing from non-resident decedents." The latter case distinctly holds that "it is the property of the decedent which is sought to be subjected to the tax;" and that "the right of the State to impose the tax is based upon its dominion over what property is situated within its territory." But whether the court was right or wrong in the Whiting case, with regard to the bonds of the United States, there can be no doubt that it acted upon the principle that the property was tangible. There is nothing, therefore, in that case which militates against our present conclusion; nothing in the majority opinion suggestive of the view that debts or choses in action, apart from the negotiable evidences thereof, may be included in the area of property of a non-resident over which the State has jurisdiction; nothing certainly in the minority opinion.

These considerations may not seem to be in entire harmony with some of the positions taken in the Romaine case (127 N. Y., 88, 89). The facts there, however, differed somewhat from the facts of the present case. It appeared that Mr. Romaine was, at the time of his death, and had been for three years prior thereto, the lessee of a box in a safe deposit company in this city, in which he kept certain securities consisting of stocks and bonds of different corporations, and a mortgage upon real estate here, as well as several pass books showing deposits by him in various savings banks. The relation of bailor and bailee thus existed between him and the safe deposit

company. It was said that the property contained in the safe-deposit box was property protected by our laws. And so it was. So far as the coupon bonds were concerned, the case is in harmony with the later authorities. As to the stocks, however, the correctness of the decision under the James case depends upon  
 33 a consideration as to which the record was silent, namely, whether the stocks were of domestic or of foreign corporations. As to the deposits in the savings banks, there is a distinction between the Romaine case and the present, in that there the pass books were permanently guarded in the safe-deposit box in this city. This distinction, we confess, seems to be shadowy, and we prefer to rest our judgment upon what we conceive to be the correct principle, supported as we are in that view by the doctrine of the later cases in the court of appeals, as well as by the deliberate judgment of the Supreme Court of the United States in the railroad bond case.

The conclusion at which we have arrived is amply supported not only by what was said in the James case, and also by the illustrative reasoning in the Phipps case (77 Hun., 325), which latter case was affirmed (143 N. Y., 641) upon the opinion of Van Brunt, *P. J.* In thus substantially adopting the views of the presiding justice in that case and in subsequently asserting similar views in the James case, the court of appeals has undoubtedly limited the Romaine case to the strictest application of its special facts, and has emphasized the general principle which was enforced in the railroad bond case. Speaking in the James case of a similar act to that now under consideration, Gray, *J.*, said: "We do not think it was the intendment of the act of 1887 to reach for purposes of taxation any personal property that was not within the State, either in fact or because of the domicile here of its owner. The reading of the act does not authorize us to construe it as an effort to tax that over which there was no jurisdiction, and it would be highly improper to impute to the legislature such an intention."

This language is equally applicable to this act of 1892, and we think it is decisive of the present appeal.

The order appealed from should be reversed, with costs.

Van Brunt, *P. J.*, Rumsey and Ingraham, *JJ.*, concur; O'Brien, *J.*, concurs in result.

34

#### New York Supreme Court.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

It is hereby stipulated and agreed that the annexed copy of the order of the supreme court, appellate division, first department, reversing the order of the surrogate of the county of New York, affirming the appraisement and determination of the surrogate in this proceeding, and the annexed copies of the notice of appeal to the court of appeals from such order of the appellate division, of the opinion written by said appellate division on the appeal from the order of said surrogate, and of the papers on such appeal, are true

and correct copies of the original papers on file in this proceeding, and of all the papers on which said surrogate and said appellate division made said orders. It is further stipulated and agreed that the said copies of said order, notice of appeal and papers on appeal need not be certified by the clerk of this court, and that the certification thereof be and the same is hereby waived, and it is consented that the appeal to the court of appeals be heard upon the annexed papers.

New York, April 10, 1896.

EMMET R. OLCOTT,

*Attorney for the Comptroller, Appellant.*

J. CULBERT PALMER,

*Attorney for Administrator, Respondent.*

35 At a surrogate's court held in and for the county of New York, at the county court-house, in the city of New York, on the 28th day of March, 1898.

Present: Hon. Frank T. Fitzgerald, surrogate.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

The comptroller of the city of New York having appealed to the court of appeals from an order of the appellate division of the supreme court, first department, bearing date the 11th day of April, 1896, duly entered in the office of the clerk of the city and county of New York on the same day, which order reversed the order of the surrogate of the county of New York entered herein on the 21st day of January, 1896, and the said court of appeals having reversed such order of the appellate division of this court and affirmed the said order of the surrogate with costs, and having ordered that the record and proceedings be remitted to the surrogate's court, county of New York, there to be proceeded upon according to law, now, on reading the remittitur of the court of appeals filed herein on March 26th, 1898, and on motion of J. Culbert Palmer, Esq., attorney for the administrator of John F. Houdayer, deceased, it is—

Ordered that the judgment of the court of appeals be, and the same is hereby, made the judgment of the surrogate's court of the county of New York.

It is further ordered that the appellant do recover his costs and disbursements herein as ordered by the said court of appeals.

[New York Surrogate's Seal.]

FRANK T. FITZGERALD, *Surrogate.*



36 UNITED STATES OF AMERICA, ss :

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the honorable the surrogates of the county of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said surrogate's court in and for the county of New York, State of New York, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit entitled In the matter of the appraisal of the property of John F. Houdayer, deceased, under the act in relation to taxable transfers of property, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction

37 of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of John H. Scudder, administrator of the estate of John F. Houdayer, deceased, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. MCKENNEY,

*Clerk of the Supreme Court of the United States.*

Allowed by—

R. W. PECKHAM,

*Associate Justice of the*

*Supreme Court of the United States.*

38 [Endorsed:] Within received & returned to Supreme Court of the United States April 7, 1898. J. Fairfax McLaughlin, clerk of the surrogate's court of New York.

## Supreme Court of the United States.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

Know all men by these presents that we, John H. Scudder, residing in the city of Trenton, State of New Jersey, and J. H. Blackwell, of the city of Trenton, county of Mercer and State of New Jersey, and Barker Gummere, Jr., of the city of Trenton, county of Mercer and State of New Jersey, are held and firmly bound unto the comptroller of the city and county of New York in the sum of five hundred dollars (500), to be paid to the said comptroller of the city and county of New York; for the payment of which, well and truly to be made, we do bind ourselves and each of us, our and each of our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the third day of March, eighteen hundred and ninety-eight.

Whereas the above-named John H. Scudder has, as administrator of the estate of John F. Houdayer, deceased, presented a writ of error to the Supreme Court of the United States to reverse the final decree rendered in the above-entitled proceeding by the surrogate's court of the city, county, and State of New York on a remittitur from the court of appeals of the State of New York: Now, therefore, the condition of this obligation is such that if the above-bounden

John H. Scudder, as such administrator as aforesaid, shall prosecute said writ of error to effect and answer all damages and costs if he fail to make said writ of error good, then this obligation shall be void; otherwise to remain in full force and virtue.

JOHN H. SCUDDER.

J. H. BLACKWELL.

BARKER GUMMERE, JR.

[L. S.]

[L. S.]

[L. S.]

Sealed and delivered in the presence of and taken and acknowledged this third day of March, 1898, before me, of Trenton, New Jersey.

H. C. ALLEN.

Approved by—

R. W. PECKHAM,

*Associate Justice of the Supreme Court  
of the United States.*

John H. Scudder, being duly sworn, deposes and says that he is a resident and freeholder within the State of New Jersey, and that he



is worth more than the sum of one thousand dollars over and above all his just debts and liabilities and exclusive of property exempt by law from levy and sale under execution.

JOHN H. SCUDDER.

Sworn to before me this third day of March, 1898.

H. C. ALLEN,  
*Notary Public of N. J.*

[L. S.]

UNITED STATES OF AMERICA, }  
*State of New Jersey, County of Mercer,* } ss :

J. H. Blackwell, being duly sworn, deposes and says that he is a resident and freeholder within the State of New Jersey, and that he is worth more than the sum of one thousand dollars over and above all his just debts and liabilities and exclusive of property exempt by law from levy and sale under execution.

J. H. BLACKWELL.

Sworn to before me this third day of March, 1898.

H. C. ALLEN,  
*Notary Public of N. J.*

[L. S.]

42 UNITED STATES OF AMERICA, }  
*State of New Jersey, County of Mercer,* } ss :

Barker Gummere, Jr., being duly sworn, deposes and says that he is a resident and freeholder within the State of New Jersey, and that he is worth more than the sum of one thousand dollars over and above all his just debts and liabilities and exclusive of property exempt by law from levy and sale under execution.

BARKER GUMMERE, JR.

Sworn to before me this seventh day of March, 1898.

H. C. ALLEN,  
*Notary Public.*

UNITED STATES OF AMERICA, }  
*State of New Jersey, County of Mercer,* } ss :

Be it remembered that on this seventh day of March, 1898, before me, the undersigned, personally appeared J. H. Blackwell, John H. Scudder, and Barker Gummere, Jr., who I am satisfied are the persons named in the within bond, and, I having first made known to them the contents thereof, they did severally acknowledge that they signed, sealed, and delivered the same as their voluntary acts and deeds for the uses and purposes therein expressed.

HARRY C. ALLEN,  
*Notary Public of N. J.*

[L. S.]

43 [Endorsed:] Supreme Court of the United States. In the matter of the appraisal of the property of John F. Houdayer, under the act in relation to taxable transfers of property. Bond in error. J. Culbert Palmer, counselor-at-law, 165 Broadway, N. Y. city

## 44 UNITED STATES OF AMERICA, ss :

To the comptroller of the city and county of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the surrogate's court in and for the city and county of New York, wherein John H. Scudder, administrator of the estate of John F. Houdayer, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this fourth day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

R. W. PECKHAM,

*Associate Justice of the Supreme Court of the United States.*

## 45 CITY AND COUNTY OF NEW YORK :

On this sixth day of April, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared Edwin P. Fischer, the subscriber, before me and makes oath that he delivered a true copy of the within citation to Bird S. Coler, the comptroller of the city and county of New York, at 280 Broadway, in the borough of Manhattan, city and State of New York, on the 6th day of April, 1898, between the hours of 3 p. m. and 4 p. m.

EDWIN P. FISCHER.

Sworn to and subscribed the 6th day of April, A. D. 1898.

[Seal of J. B. Paige, Notary Public, New York Co., N. Y.]

J. B. PAIGE,

*Notary Public, No. 104, New York County.*

Certificates filed in Westchester and Kings county.

STATE OF NEW YORK, }  
County of New York, } ss :

I, William Sohmer, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify that J. B. Paige, before whom — annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes; that I am well acquainted with the handwriting of said notary, and that her signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 7 day of Ap'l, 1898.

[Seal New York.]

WM. SOHMER, *Clerk.*

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## Supreme Court of the United States.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

Afterwards, to wit, on the — day of —, 1898, at the October term for 1897 of the Supreme Court of the United States, at the capitol, in the city of Washington, in the District of Columbia, comes John H. Scudder, as administrator of the estate of John F. Houdayer, deceased, by J. Culbert Palmer, his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

## First.

That the property in question being situated in the State of New Jersey, of which State also the decedent was a resident at the time of his decease, the laws of the State of New York have no application thereto nor have the courts of New York jurisdiction thereof.

## Second.

That by the law as interpreted by the decision and judgment herein the legislature of the State of New York attempts to exercise jurisdiction beyond the State and to affect contracts and rights of a citizen of another State which are protected by the Constitution and laws of the United States and the judicial power granted to its courts, and violates and interferes with the sovereignty of the State of New Jersey.

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## Third.

That the act of the legislature of the State of New York herein referred to as applied to the facts and circumstances of this case or the act done under the authority of the State of New York here complained of is unconstitutional and void as being repugnant to section 10 of article I of the Constitution of the United States, in that it impairs the obligation of the contract between a non-resident depositor and the Farmers' Loan & Trust Company of New York.

## Fourth.

That the said act of the legislature as interpreted by the decisions herein is repugnant to the fifth amendment of the Constitution of the United States, which provides that private property shall not be taken for a public use without just compensation.

## Fifth.

That the said act of the legislature as interpreted by the decision herein is repugnant to sec. 1 of the 14th amendment of the Constitution of the United States, by which States are forbidden to deprive citizens of life, liberty, or property without due process of law.

Wherefore the said John H. Scudder, as administrator as aforesaid, prays that the decision herein of the surrogate's court of the county

and State of New York on the remittitur of the court of appeals of the State of New York be reversed and said proceeding be dismissed.

Dated April 4th, 1898.

J. CULBERT PALMER,  
*Attorney for Plaintiff in Error.*

48 [Endorsed:] Supreme Court of the United States. In the matter of the appraisal of the property of John F. Houdayer, deceased, under the act in relation to taxable transfers of property. Assignment of errors. J. Culbert Palmer, counselor-at-law, 165 Broadway, N. Y. city.

49 STATE OF NEW YORK :

Court of Appeals, Clerk's Office.

I, W. H. Shankland, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed typewritten copy of the opinions of Vann, judge, and Gray, judge, in the case of "In the matter of the appraisal for taxation of the estate of John F. Houdayer, deceased," decided by the court of appeals of the State of New York, October 6th, 1896, and reported in volume 150 of New York Reports, at page 37, &c., with the printed copies thereof, reported as aforesaid, and that the same are true and correct copies of the said printed and reported opinions; and I further certify that at the time of the rendering of said opinions and the publication thereof Edmund H. Smith was the official reporter of the court of appeals of the State of New York, and full credit and credence should be given to his official acts.

In witness whereof I have hereunto set  
Seal Court of Appeals, my hand and affixed my official seal, at  
State of New York. the city of Albany, this twenty-fifth day of  
February, A. D. 1898.

W. H. SHANKLAND, *Clerk.*

50 Court of Appeals, State of New York.

In the Matter of the Appraisal for Taxation of the Estate of JOHN  
F. HOUDAYER, Deceased.

VANN, J.:

On the 21st of May, 1895, John F. Houdayer died intestate at Trenton, New Jersey, where he had resided for a number of years. In 1876 he opened an account with the Farmers' Loan & Trust Company of the City of New York, as trustee under the will of Edward Husson, deceased, in which he made deposits from time to time of moneys belonging to the trust estate, as well as moneys belonging to himself. This continued as an open running account until his death, when the balance on hand was the sum of \$73,715, of which \$2,000 belonged to him as trustee, and the remainder to himself as individual. The appraiser deducted \$3,500 for the payment of debts and expenses, and included \$68,215 in the appraisal,

which was affirmed by the surrogate, but reversed by the supreme court. The theory upon which that learned court decided the case appears in the following extract from its opinion: "It is well settled that the legal relation which existed between the decedent, as such trustee, and the Farmers' Loan and Trust Company was that of debtor and creditor. The deposits became the property of the trust company, and thereupon the company became indebted to the depositor for the amount so deposited. Here, however, even this relation existed only between the decedent in his representative capacity as trustee under the will of Edward Husson and the company. Individually he occupied no contract relation toward the company. His individual deposits simply went to swell the trust

51 account. Ordinarily it would have required an accounting in equity to separate the individual from the trust deposits and to appropriate the general bank balance in accordance with just principles. Here this separation was amicably arranged between the decedent's estate and the trust estate, but this was merely a friendly substitute for an accounting. Precisely what the decedent had individually within this State was the right to an accounting in equity with regard to a debt due from the company to himself as Husson's trustee. We do not think that the debt was property within this State, within the meaning of the taxable transfer act. Much less was the right to an accounting with respect to such debt."

In my judgment this is sound reasoning upon an unsound basis, because it places form before substance. It enables a large sum of money invested and left in this State and enjoying the protection of its laws to escape taxation because the decedent had voluntarily commingled his own funds with those of an estate he represented, and for the further reasons that his rights as against the trust company were intangible. But what were his rights or those of his successors, as against the State of New York, in view of the command of its legislature that all property or interest in property within the State, susceptible of ownership, should be subject to a transfer tax upon the death of its owner, whether he was a resident or non-resident? What was the real thing, the essence of the transaction, that gives rise to this controversy? The decedent brought his money into this State, deposited it in a bank here, and left it here until it should suit his convenience to come back and get it. While the

commingling of funds may complicate administration, it does  
52 not change the facts as thus stated. If he had deposited in specie, to be returned in specie, there can be no doubt that the money would be property in this State subject to taxation. But, instead, he did as business men generally do, deposited his money in the usual way, knowing that not the same, but the equivalent, would be returned to him on demand. While the relation of debtor and creditor technically existed, practically he had his money in the bank and could come and get it when he wanted it. It was an investment in this State subject to attachment by creditors. If not voluntarily repaid he could compel payment through the courts of this State. The depositary was a resident corporation, and the re-

ceiving and retaining of the money were corporate acts in this State. Its repayment would be a corporate act in this State. Every right springing from the deposit was created by the laws of this State. Every act out of which those rights arose was done in this State. In order to enforce those rights it was necessary for him to come into this State. Conceding that the deposit was a debt; conceding that it was tangible, still it was property in this State for all practical purposes, and in every reasonable sense within the meaning of the transfer tax act. (*In re Romaine*, 127 N. Y., 80, 89.)

While distribution of the fund belongs to the State where the decedent was domiciled, as such distribution cannot be made until his administrator has come into this State to get the fund, possibly, after resorting to the courts for aid in reducing it to possession, the fund has a situs here because it is subject to our laws. A reasonable test in all cases, as it seems to me, is this: Where the right, wherever it may be, has a money value and can be owned and transferred, but cannot be enforced or converted into money against the will of the person owing the right without coming into this State, it is property within this State for the purposes of a succession tax. Thus the right in question is property, because it is capable of being owned and transferred. It is within this State, because the owner must come here to get it. It is subject to taxation, because it is under the control of our laws. It has a money value, because it is virtually money or can be converted into money upon demand. It is subject to a transfer tax, because the passing by gift or inheritance of "all property or interest therein, whether within or without this State, over which this State has any jurisdiction for the purposes of taxation," comes within the expressed intention of the legislature.

I regard further discussion as unnecessary, as I have fully expressed my views as to the scope of the statute in the Bronson case, decided herewith.

While a majority of my associates concur in the result reached by me, they do not all concur in the reasons given therefor. They are of the opinion that a deposit of money in a bank, although technically a debt, is still money, for all practical purposes, and as such is taxable under the transfer tax act.

The order of the supreme court should therefore be reversed and the order of the surrogate affirmed with costs.

(GRAY, J., dissenting :)

When the deceased made deposits with the trust company, they became the property of the depository, and the relation which sprang up between them was that of debtor and creditor. The right of the decedent as a depositor was a mere chose in action. More than that, as the account in the trust company was with the decedent, as trustee of Husson's will, there was, of course, no clear liability to him individually. The sum owing to him could only be established as the result of an accounting or by amicable arrangement in lieu thereof; thus all that the decedent owned in



this State at the time of his decease, to put it in its strongest expression, was the right to an equitable accounting with respect to the debt due to him as Husson's trustee. To say that that constituted "property" within the meaning of the act would be to carry the doctrine of the inheritance tax law too far for support in law or in reason.

I think the order appealed from should be affirmed with costs.

O'Brien, J., concurs with Vann, J.; Andrews, ch. J., Bartlett and Martin, JJ., concur in result of opinion of Vann, J.; Haight, J., concurs with Gray, J.

Ordered accordingly.

54½ [Endorsed:] Opinion Ct. of appeals. J. Culbert Palmer, counselor-at-law, 165 Broadway, N. Y. city.

55 All which we have caused by these presents to be exemplified and the seal of our said surrogate's court to be hereunto affixed.

Witness Hon. Frank T. Fitzgerald, a surrogate of the county of New York, at the city of New York, the seventh day of April, in the year of our Lord one thousand eight hundred and ninety-eight, of our Independence the one hundred and twenty-second.

[New York Surrogate's Seal.]

J. FAIRFAX McLAUGHLIN,  
*Clerk of the Surrogate's Court.*

I, Frank T. Fitzgerald, a surrogate of said county and presiding magistrate of the surrogate's court, do hereby certify that J. Fairfax McLaughlin, whose name is subscribed to the preceding exemplification, is the clerk of said surrogate's court of the county of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said surrogate's court, and that the attestation thereof is in due form and according to the form of attestation used in this State.

Dated New York, April 7th, 1898.

FRANK T. FITZGERALD, *Surrogate.*

STATE OF NEW YORK, }  
County of New York, } ss:

I, J. Fairfax McLaughlin, clerk of the surrogate's court of the county of New York, do hereby certify that Hon. Frank T. Fitzgerald, whose name is subscribed to the preceding certificate, is the presiding magistrate of the surrogate's court of the county of New York, duly elected, sworn, and qualified, and that the signature of said magistrate to said certificate is genuine.



In testimony whereof I have hereunto set my hand and affixed the seal of the said court this 7th day of April, 1898.

[New York Surrogate's Seal.]

J. FAIRFAX McLAUGHLIN,  
*Clerk of the Surrogate's Court.*

Endorsed on cover: Case No. 16,844. New York, New York county, surrogate's court. Term No. 276. John H. Scudder, administrator of the estate of John F. Houdayer, deceased, plaintiff in error, vs. The Comptroller of the City and County of New York. Filed April 11, 1898.